Supreme Court, U.S.
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No. 98-1895

In The

Supreme Court of the United States

October Term, 1998

Diane Sank

v.

Bergen County Superintendent

Of Elections, et al.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

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Addendum of Statement of the Case

As of this date, no Respondent to this matter has filed a brief in opposition to this petition which conforms to the rules promulgated by this Court. The time for such a response has run. The Office of the Attorney General, has however, filed with Mr. William K. Suter, the Clerk of the Court, a letter brief, which is often used in lieu of a formal brief pursuant to New Jersey Rules of Court. (See Letter Brief at 1a).

In the letter brief, legal arguments were advanced and authorities cited for the reasons not to grant a writ of certiorari. The letter brief was drafted and signed by Andrea M. Silkowitz, Esq., in her capacity at Assistant Attorney General for the State of New Jersey, sent to the Court on April 23, 1999.

Attached to Respondent's letter brief was a signed waiver form, indicating to this Court that the Office of the Attorney General did not intend to file a response to the petition for a writ of certiorari unless one was requested by the Court. The form indicated that Ms. Silkowitz was filing an appearance as Counsel of Record for Respondents Bergen County Superintendent of Elections and the Bergen County Board of Elections.

Inasmuch as the letter brief advances legal arguments and cites authorities for reasons not to grant a writ of certiorari, the Petitioner submits this reply brief.

POINT I THE ATTORNEY GENERAL'S LETTER BRIEF IS NOT IN CONFORMITY WITH THE RULES PROMULGATED BY THE RULES OF THIS COURT AND SHOULD BE STRICKEN FROM THE RECORD.

Rule 15 of the *Rules of the Supreme Court of the United States* govern the submission, content, and format of briefs in opposition. This rule was not followed by the Attorney General. As a result, Petitioner was placed in a dilemma. She could either ignore the existence of the letter brief and pray that the Court would ignore the document and its arguments -- or she could reply, rebutting the arguments against granting of her petition.

The Petitioner is before this court *pro se*. The Attorney General has an army of attorneys at his command. Petitioner is wary of the reasons that the Attorney General waived his right to file a respondent brief and at the same time send this Court a letter brief. It is impossible for Petitioner not to wonder why the Attorney took this route to file a brief. Was the letter brief filed on the off chance that Petitioner would not reply to it? Given the influence of the Attorney General's office, would the unchallenged letter brief carry weight with the Court, particularly without a reply from the Petitioner?

The logical choice for the Petitioner was to reply. To do otherwise would be to allow the Attorney General's brief to go unchallenged. The Petitioner chooses not to take the risk of allowing the letter brief to go unchallenged.

The Petitioner would ask this Court to strike the letter brief with prejudice for non-conformity with the rules of court. R. 15 of the *Rules of the Supreme Court of the United States*. and refuse any other briefs from the Attorney General that might be submitted in an untimely manner.

POINT II ALTHOUGH THE ORIGINAL RELIEF SOUGHT BY PETITIONER IS NO LONGER POSSIBLE, THE RESPONDENTS CONTINUE THEIR UNCONSTITUTIONAL ELECTION PRACTICES WHILE THE ISSUES EVADE REVIEW.

The Attorney General would have this Court believe that the reasons for granting this Petition are moot and that the reasoning of *Morse et al. v. Republican Party of Virginia*, 517 *U.S.* 186 (1996) have no application to the instant case. The Petitioner submits that the Attorney General is missing the point of the *Morse* Court which assumed jurisdiction of an election case in which the original relief requested was no longer possible but a decision on the merits would prevent the continuation of unconstitutional election practices that continued to infringe upon voter's rights.

The *Morse* Court said in no uncertain terms, "Like other cases challenging electoral practices, *** this controversy is not moot because it is 'capable of repetition, yet evading review,'" citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

In the instant case, irregularities in the voting process which dilute and deprive voters of their legally cast votes -- -- continue to plague the voting booths in New Jersey as illustrated by the articles contained in the appendix of this reply brief. They cover a ten year span and contain many instances of alleged voter fraud, tied elections, and those election outcomes which hinge upon a fair determination by a court on the validity of a single vote.

New Jersey, like most states is made up of small towns and municipalities. Elections are won or lost on a single vote. The elections occur frequently. Boards of Election which are

charged with running procedurally fair elections continue to ignore the rules legislated for the protection of the voters and the integrity of the electoral process. To ad insult to injury, the courts capriciously refuse to follow the statutes which govern the electoral process and instead creatively construe the statutes, caselaw, rules of court, and rules of evidence to the general confusion of any party to an action before them.

The instant case before this court is the perfect example of the result of the judicial chaos which continues to wreak havoc in the New Jersey court system -- to the injuries of voters and candidates alike. In the instant case, the trial court ignored the clear meaning of *N.J.S.A.* 19:52-3 which states that "No voter after having entered and emerged from the voting booth shall be permitted to re-enter that same on any pretext whatsoever." The trial court refused to declare a vote illegal when a voter admitted going into the voting booth twice and casting two votes! (See Point II of Petition).

Flaunting the rules of evidence and the Petitioner's constitutional right to witnesses, the trial court refused to allow the Petitioner to depose her hand-writing expert (who is well respected in federal and state courts) preventing her from proving that six signatures on absentee ballots and other voting credentials were not genuine. (See Issue III of Petition).

The Petitioner trailed the winner by six votes. However, she did not, in fact, lose the election. *N.J.S.A.* 19:29-1(e) provides that elections can be contested when "legal votes are rejected" in a number "sufficient to change the result" of the election. The Respondent Superintendent of Elections admitted that eight votes had not been tabulated by the voting machines -- two votes more than the number sufficient to have the election declared invalid according to the statute. Instead the trial judge ruled that these votes were of no consequence

because (based on the Superintendent's past experiences) these voters either "fled" the booths without voting or were "confused" and failed to register their votes. (See Point II of Petition).

This type of judicial abuse is typical of trial courts today and is particularly onerous when winning or losing an election often hinges upon a single vote. Not a year goes by without the New Jersey courts being faced with election contest actions wherein they must decide on whether certain votes were legally cast and whether the election itself was conducted according to the legislative procedures designed to insure the integrity of the electoral process. This problem is exacerbated when the Attorney General refuses to instruct his Boards of Election to supervise elections according to state statutes. Furthermore, voter's rights to have their votes counted, will continue to be denied by a judicial system which does not follow the laws.

It should be noted by this court, that the New Jersey appellate system is also part of the problem. With increasing frequency these courts refuse to come to a decision until the time is passed for a new election -- thus eliminating and making moot the need for an new election or a runoff.

In Respondent's letter brief, the Attorney General reasoned that this petition should be denied because "the issues raised are factually limited to the 1995 election" and "are unlikely to recur" [sic] and no remedy is available for the alleged improprieties."

The Petitioner is shocked by the Attorney General's reasoning. The office of the Attorney General is charged with overseeing the election process. The guidelines for running elections come directly from his office. His legislative mandate is to insure the integrity of the electoral process.

Respondent cites *Lewis v. Continental Bank Corp.*, 494 *U.S.* 474 (1990) for the premise that the instant case is moot. However, in that case, the Florida laws which prevented the plaintiff out-of-state holding company from owning an in-state bank, were rendered moot by federal legislation, i.e. 1987 BHCA amendments. In the instant case, the injurious laws are still in full force and are being challenged not as they are written but as to how they are being unconstitutionally applied.

In summary, the Petitioner admits that the time has passed wherein Petitioner could serve on the Englewood Cliffs council by being granted a new election. However the time has not passed wherein this Court can remedy the election practices which promote voter fraud and slovenly supervision of the elections which allow votes to magically disappear under an articulated cloak of "voter confusion" or "failure to register."

POINT III THIS PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE.

In his letter brief the Attorney General expressly states an opinion that this Petition "presents no question of general public importance." The Petitioner passionately disagrees. The right to vote and the right to have that vote counted for its full worth are fundamental rights upon which our country is founded. *U.S. v. Mosley*, 383 *U.S.* 904 (1915). Furthermore, this Court, in the past, has ruled that the right to vote is a federally protected right which cannot be taken from a voter through dilution or a failure to count that vote. *Griffin v. Burns*, 570 *F.2d* 1065 (1st Cir. 1978).

Petitioner suggests that the Attorney General's opinion that voters' right are of no great public importance, is a Freudian slip of egregious and significant magnitude -- it betrays the lack of importance the Attorney General gives to insuring that the integrity of elections. This is a denial of the importance of and a rejection of his very job description. Under the Governor of the State, he is the head of executive functions of government. All Boards of Elections are under his directives and supervision.

POINT IV IN REACHING THE DECISIONS BELOW, THE COURTS DID NOT USE "ADEQUATE AND INDEPENDENT" STATE LAW BUT USED LAWS ENACTED TO PROTECT THE RIGHTS TO VOTE IN STATE AND FEDERAL ELECTIONS, THUS GIVING THIS COURT JURISDICTION.

In the letter brief, Respondent states that the issues herein were disposed of by the New Jersey court on "the basis of "adequate and independent" state laws and therefore are not subject to Supreme Court review, citing *Zucchini v. Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562 (1977). Petitioner argues that this is not true. The laws used to deny the Petitioner a remedy for her injuries were not unconstitutional on their face, but unconstitutional as applied. Furthermore, Petitioner is arguing that while the state has the right to regulate the election process, it does not have the right to regulate it in such a way that voters are disenfranchised by a failure to count their votes or by diluting them.

The Attorney General states that the decisions below were grounded in "adequate and independent" state laws but this statement is inaccurate and misleading. The Petitioner is

appealing from the highest court in the state and that court denied to reach the merits of the constitutional issues clearly raised, giving this Court §1257 jurisdiction. Furthermore, the prior decisions of the trial court and appellate court rested on state statutes which were grounded in the Constitutional concept of protecting the citizens' right to vote in both state and federal elections, including those challenged herein as unconstitutionally applied.

It is submitted to this Court that if the laws enacted by the State of New Jersey continue to be unconstitutionally applied in such a manner as to deny the concept of "one person, one vote," the Petitioner, as well as others, will continued to be disenfranchised by the electoral process maintained by the Respondent Board and Superintendent of Elections, which in turn, is governed by an Attorney General who is of the opinion that the protection of right to vote is not of "great public importance."

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: July 7, 1999